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No. 81-2321

IN THE

Supreme Court of the United States

October Term, 1981

DOYLE E. WAIDE, *Petitioner,*

v.

THE UNITED STATES, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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QUESTION PRESENTED

1. Whether the "fresh start" policy underlying Section 525 of the Bankruptcy Reform Act of 1978,[1] codifying the result of *Perez v. Campbell*,[2] bars the Government from dismissing an employee for excessive indebtedness shortly after he filed bankruptcy, where the Government learned of the indebtedness only from the filing of the bankruptcy petition, and where there is no evidence that such indebtedness had affected his employment or otherwise reflected unfavorably upon the Government.

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1. Pub. L. No. 95-598, § 525, 92 Stat. 2549, 2593, (codified at 11 U.S.C. § 525 (Supp. IV 1980)).

2. 402 U.S. 637 (1971).

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DOYLE E. WAIDE, *Petitioner,*

v.

THE UNITED STATES, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The petitioner Doyle E. Waide respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Claims entered in this proceeding on January 29, 1982.

OPINION BELOW

The opinion of the Court of Claims, not yet reported, appears in Appendix 1 hereto.

JURISDICTION

The Order of the Court of Claims granting respondent's motion for summary judgment and dismissing petitioner's petition, was entered on January 29, 1982. A timely motion for rehearing was denied on March 19, 1982, and this petition for writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1255(1).

STATUTORY PROVISION INVOLVED

United States Code, Title 11:

> § 525. *Protection against discriminatory treatment*
>
> Except as provided in Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499a-499s), the Packers and Stockyards Act, 1921 (7 U.S.C. 181-229), and section 1 of the Act entitled "An Act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1944, and for other purposes," approved July 12, 1943 (57 Stat. 422; 7 U.S.C. 204), a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

STATEMENT OF THE CASE

This case raises important issues concerning the availability of the "fresh start" policy underlying Section 525 of the Bankruptcy Reform Act of 1978, 11 U.S.C. § 525 (Supp. IV 1980), codifying the doctrine of *Perez v. Campbell*, 402 U.S. 637 (1971), to federal employees who are subject to dismissal for "indebtedness" if they file for bankruptcy.

On July 31, 1977, following investigation of his written employment application,[3] petitioner Doyle Waide received

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3. The employment application, Personal Qualifications Statement, Standard Form 171 of the United States Civil Service Commission, asked no questions and contained no information relating to petitioner's past or present indebtedness.

a career-conditional appointment as a Border Patrol Agent with the United States Immigration and Naturalization Service ("INS") at Chula Vista, California, subject to satisfactory completion of a one-year probationary period.[4] On July 26, 1978, five days before completion of his probationary period, the INS wrote a letter[5] to petitioner stating that it was necessary to terminate his employment, effective at midnight on July 29, 1978, because of

> your excessive indebtedness which reflects unfavorably upon this Service and further reflects adversely upon the Government, as your employer. The fact that you allowed yourself to incur debts to the point that you were not able to discharge them shows that you lack the judgment required of an officer of this Service.[6]

On May 2, 1978, petitioner and his wife had filed a petition in bankruptcy in San Diego, California, for the discharge of separate and community debts, all of which had been incurred prior to petitioner's appointment as a Border Patrol Agent. Only the filing of the bankruptcy petition brought petitioner's indebtedness to the attention of the INS, and the INS had no other knowledge of the bankruptcy or of its causes. No creditor or other person had ever complained to the INS about petitioner and his job performance had been entirely satisfactory.

On July 27, 1978, petitioner was interviewed by supervisory officials of the INS about his termination, "as it related to his indebtedness and his having filed a bankruptcy. . . ."[7] Section 3-13 of the Border Patrol Handbook[8] was read to him and he was asked his reasons for taking bankruptcy. He responded that it was a legal means to resolve his debts, and was necessary to keep his

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4. 5 C.F.R. §§ 315.801-315.804 (1982). *See* Appendix 5.

5. Hand-delivered to petitioner on July 28, 1978.

6. *See* Appendix 8.

7. *See* Appendix 9.

8. *See* Appendix 6.

creditors from coming to his place of employment and to sustain his family. Petitioner also stated, when asked what efforts he had made to resolve his indebtedness, that he had attempted to borrow money at a local credit union, but was denied because of the pending bankruptcy and a 1971 bankruptcy in Washington State. He was asked if he had made restitution to his creditors after the 1971 bankruptcy, and replied that he had not. Inquiry was then made about disposition of his assets in the pending bankruptcy. The interviewers concluded that petitioner was "apparently incredulous that the Service should reproach [bankruptcy] action on his part."[9]

On January 25, 1980, after exhausting administrative remedies,[10] petitioner commenced an original action under the Tucker Act, 28 U.S.C. § 1491 (Supp. III 1979), in the United States Court of Claims claiming wrongful discharge and seeking reinstatement and backpay in excess of $10,000. The case was heard on cross motions for summary judgment,[11] and the court granted the Government's motion,

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9. *See* Appendix 9.

10. Petitioner appealed his termination to the Federal Employee Appeals Authority (FEAA) of the United States Civil Service Commission, pursuant to 5 C.F.R. § 315.806 (*See* Appendix 5). The FEAA held on September 22, 1978 that it lacked jurisdiction over petitioner's appeal, which did not allege that the termination was based on discrimination because of race, color, sex, national origin, or age, or that the termination was effected in violation of procedural requirements. Because the Civil Service Reform Act of 1978, 5 U.S.C. §§ 1201-1209 (Supp. IV 1980), abolished the United States Civil Service Commission effective January 11, 1979 and transferred the FEAA's jurisdiction to the new Merit Systems Protection Board (MSPB), petitioner filed a motion with the MSPB requesting it to reconsider the FEAA decision. The MSPB denied this motion, stating that all of petitioner's administrative rights had been exhausted. Petitioner did not appeal the decision of the MSPB pursuant to 5 U.S.C. § 7703 (Supp. IV 1980), but instead commenced this original action in the Court of Claims under the Tucker Act, 28 U.S.C. § 1491 (Supp. III 1979).

11. Petitioner's motion for summary judgment was based on the claim that his termination violated Section 525 of the Bankruptcy Reform Act of 1978.

denied petitioner's motion, and dismissed his petition. The court held that petitioner "was dismissed not for filing a bankruptcy petition, but because his continued excessive indebtedness reflected unfavorably upon the INS and the Government."[12]

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts with this Court's Decision in *Perez v. Campbell*, 402 U.S. 637 (1971), and with the Codification of the *Perez* Doctrine in Section 525 of the Bankruptcy Reform Act of 1978, Proscribing Governmental Action the Effect of Which is to Deny Bankrupts Full Opportunity for a Fresh Start.

The decision of the Court of Claims conflicts with the principle enunciated by this Court in *Perez v. Campbell*, 402 U.S. 637 (1971), proscribing governmental action the effect of which is to deny bankrupts full opportunity for a fresh start. The decision also frustrates the unequivocal intent of Congress to codify the *Perez* doctrine in Section 525 of the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 525, 92 Stat. 2549, 2593 (codified at 11 U.S.C. § 525 (Supp. IV 1980)).[13]

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12. The INS knew of petitioner's indebtedness only through his having filed bankruptcy on May 2, 1978. The record contains no evidence that petitioner's indebtedness had in any way reflected unfavorably on the INS or the Government.

13. The Court of Claims assumed, without analysis, that 11 U.S.C. § 525 was not applicable to this case. The unexplained refusal of the court to apply Section 525 to this case is plain error. Unless otherwise provided, the Bankruptcy Reform Act is to take effect October 1, 1979. Pub. L. No. 95-598, Title IV, § 402, 92 Stat. 2682. This action was commenced on January 25, 1980. The only explanation for this plain error is that the court may erroneously have assumed that this action was an appeal from the decision of the Merit System Protection Board (MSPB) pursuant to 5 U.S.C. § 7703. However, the petition filed in the Court of Claims states that jurisdiction was invoked only under 28 U.S.C. § 1491. This Court should grant summary reversal because of the Court of Claim's plain error in refusing to apply Section 525 of the Bankruptcy Reform Act to this Tucker Act action which was commenced after the effective date of the

In *Perez*, this Court held unconstitutional an Arizona statute providing for the suspension of the driver's license of any driver having an unsatisfied tort judgment, even if the judgment had been discharged in bankruptcy. This Court held that the statute conflicted with the policy underlying the federal Bankruptcy Act ensuring a bankrupt "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt," 402 U.S. at 648, citing *Local Loan Co. v. Hunt*, 292 U.S. 234 (1934). In so doing, the Court overruled its earlier decisions in *Kesler v. Department of Public Safety*, 393 U.S. 153 (1962), and *Reitz v. Mealey*, 314 U.S. 33 (1941), which focused on the *purpose* of the state statutes in question and not on their *effect* on federal bankruptcy policy. 402 U.S. at 651.

Under *Perez*, a state cannot deprive a person of the means of earning his livelihood for nonpayment of a debt that has been discharged in bankruptcy, where the effect of such action (even if it serves a legitimate state purpose) is to deprive the person of his right to a "fresh start" under the federal Bankruptcy Act.

In 1978, as part of the Bankruptcy Reform Act, Congress enacted 11 U.S.C. § 525:

> *§ 525 Protection against discriminatory treatment.*
>
> . . . [A] governmental unit may not . . . terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, . . . solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt

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Footnote 13 (con't)

Bankruptcy Reform Act, thereby avoiding consideration of the Question Presented until after the Court of Claims has had opportunity to interpret Section 525 and apply it to the facts of this case.

> that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

The House and Senate Reports state unequivocally that this section is intended to codify the *Perez* result.[14] [15]

Section 525 prohibits discrimination by any governmental unit that is "based solely on the basis of the bankruptcy, *on the basis of insolvency before or during bankruptcy prior to a determination of discharge*, or on the basis of nonpayment of a debt discharged in the bankruptcy case (the *Perez* situation)." S. Rep. at 5867; H.R. Rep. at 6322 (emphasis added).[16] Any employment discrimination which amounts to an automatic reaction to an employee's resort

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14. S. Rep. No. 989, 95th Cong., 2d Sess. 81, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 5867 [hereinafter cited as S. Rep.]; H.R. Rep. No. 595, 95th Cong., 2d Sess. 366, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5963, 6322 [hereinafter cited as H.R. Rep.]. *See* Appendix 10.

15. Prior to codification of the *Perez* rule in 11 U.S.C. § 525, several courts had applied the rule in a variety of contexts. In *Rutledge v. City of Shreveport*, 387 F. Supp. 1277 (W.D.La. 1975), the court held that a police department regulation subjecting an officer to dismissal for indebtedness resulting in bankruptcy or garnishment was unconstitutional. The court noted that, while the purpose of the rule was to prevent excessive indebtedness as a means of insuring a reliable and respectable police force, the impermissible effect of the rule was to prohibit an officer burdened with staggering debts from obtaining a fresh start, in direct contravention of the purpose of the Bankruptcy Act. *See also In re Loftin*, 327 So. 2d 543 (La. Ct. App. 1976), *cert. denied*, 327 So. 2d 543 (La. 1976), and *In re Hicks*, 133 F. 739 (N.D.N.Y. 1905). In *Handsome v. Rutgers University*, 445 F. Supp. 1362 (D.N.J. 1978), the court held that withholding a transcript by a state university from a former student whose student loan had been discharged in bankruptcy transgressed upon the fresh start policies of the Bankruptcy Act enunciated in *Perez*. The Supreme Court of California in *Grimes v. Hoschler*, 12 Cal. 3d 305, 115 Cal. Rptr. 625, 525 P.2d 65 (1974), *cert. denied*, 420 U.S. 973 (1975), held that a state statute providing for disciplinary action against licensed contractors who had obtained an adjudication in bankruptcy violated the purpose of the Bankruptcy Act by discouraging licensed contractors from resorting to the bankruptcy laws.

16. "Insolvent" is defined in Section 1(26) of the Reform Act as the financial condition such that the sum of one's debts is greater than all of one's property, at fair valuation. 11 U.S.C. § 101 (26).

to the protection of the bankruptcy laws is prohibited. H.R. Rep. at 6126. The emphasis, as in *Perez*, is on the *effect* of the governmental action rather than its stated purpose or reason.

Both the House and Senate reports clarify that, while disciplinary or punitive action for resorting to the protection of the bankruptcy laws is proscribed, consideration of factors such as nondiscriminatory rules applicable to *future* financial responsibility and ability is permissible, if applied without discrimination. S. Rep. at 5867; H.R. Rep. at 6322.

The House Report notes that "in those cases where the causes of a bankruptcy are intimately connected with the . . . employment in question, an examination into the circumstances surrounding the bankruptcy will permit governmental units to pursue appropriate regulatory policies and take appropriate action without running afoul of bankruptcy policy." H.R. Rep. at 6126. The implication here is that where indebtedness that resulted in bankruptcy has *not* been shown to be related to the employment in question, examination by the employer into the circumstances of the bankruptcy might well run afoul of bankruptcy policy.

The legislative reports also emphasize that it is for the courts to develop and mark the contours of the anti-discrimination policies of the *Perez* doctrine, codified in Section 525, in pursuit of sound bankruptcy policy. S. Rep. at 5867; H.R. Rep. at 6126, 6323.

Heeding the admonition of Congress that Section 525 is to be interpreted liberally so as to fulfill federal bankruptcy policy, the courts have applied the section expansively to strike down a broad range of discriminatory acts by governmental units against debtors and bankrupts.[17] The

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17. The courts have applied *Perez* as codified in § 525 to a variety of contexts in striking down government action discriminating against bankrupts. These contexts include denial of government contracts to former bankrupts, *In re Marine Elec. Ry. Prod.*, 17 Bankr. 845 (Bankr. E.D.N.Y. 1982); *In re Coleman American Moving Services, Inc.*, 8 Bankr. 379 (Bankr. D. Kans. 1980); denial of a liquor license to a debtor discharged in bankruptcy, *In re Maley*, 9 Bankr. 832 (Bankr. W.D.N.Y. 1981); eviction

Court of Claims decision stands alone in failing to apply Section 525 in favor of an individual seeking the protection of the bankruptcy laws against adverse governmental action.[18]

The Court of Claims attempts to avoid the *Perez* doctrine[19] by stating that petitioner "was dismissed not for filing a bankruptcy petition, but because his continued excessive indebtedness reflected unfavorably upon the INS and the government." However, under the undisputed facts of this case, this is a distinction without a difference. The INS had no knowledge of petitioner's indebtedness, other than the fact that he had filed for bankruptcy, prior to writing the termination letter of July 26, 1978. The INS had asked petitioner nothing about his past or present indebtedness at the time it employed him, and no creditor had complained to the INS concerning petitioner's indebtedness during his

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Footnote 17 (con't)

of a bankrupt from a public housing project, *In re Gibbs*, 9 Bankr. 758 (Bankr. D. Conn. 1981); denial of university transcripts to former bankrupts who had student loans discharged, *In re Richardson*, 15 Bankr. 925 (Bankr. E.D.Pa. 1980); *In re Howren*, 10 Bankr. 303 (Bankr. D. Kans. 1980); *In re Heath*, 3 Bankr. 351 (Bankr. N.D. Ill. 1980); denial or revocation of a driver's license of individuals with discharged monetary judgments relating to traffic accidents, *In re Sampson*, 17 Bankr. 528 (Bankr. D. Conn. 1982); *In re Duffey*, 13 Bankr. 785 (Bankr. S.D. Ohio 1981); *In re Briner*, 10 Bankr. 850 (Bankr. D. Colo. 1981); *In re Young*, 10 Bankr. 17 (Bankr. S.D. Cal. 1980).

18. *Marshall v. District of Columbia*, 559 F.2d 726 (D.C.Cir. 1977), was decided before enactment of 11 U.S.C. § 525 and is readily distinguishable from the instant case. The court held that the Bankruptcy Act does not prohibit an employer from using the fact of bankruptcy in considering whether the past record of a job applicant justifies a refusal to offer him employment. Marshall was not yet employed by the Government; he was asked about his financial status in his employment application; and the refusal to employ him was not in reaction to his recently having filed bankruptcy.

19. The Court of Claims erroneously refused to apply Section 525 to this case. See note 13, *supra*.

employment.[20] Petitioner's job performance had been entirely satisfactory, and there is no suggestion that petitioner had been the subject of any corruption attempts or that any action by him had reflected adversely upon the INS or the Government. There is also no evidence of any connection between the cause of petitioner's bankruptcy and his employment. Although the INS stated in petitioner's termination letter that "[t]he fact that you allowed yourself to incur debts to the point that you were not able to discharge them shows that you lack the judgment required of an officer of this Service,"[21] there is no evidence that the INS made any inquiry concerning the nature, extent or causes of petitioner's indebtedness or the allocation of the indebtedness between petitioner and his wife.

The focus of the INS in the termination interview was petitioner's bankruptcies, as evidenced by the INS memorandum of July 27, 1978.[22] Petitioner was questioned about his "having filed a bankruptcy petition," "his personal need and reason for petitioning the Court for relief by bankruptcy action," whether he had made restitution of debts discharged in the 1971 bankruptcy, and the disposition

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20. In this respect, the present case is distinguishable from those circuit court decisions upholding the discharge of federal employees for indebtedness. *See Dennis v. Blount*, 497 F.2d 1305 (9th Cir. 1974) (upholding the discharge of a Postal Service employee for indebtedness which had been brought to the service's attention by a complaint from the creditor); *Robinson v. Blount*, 472 F.2d 839 (9th Cir. 1973) (upholding the discharge of a Postal Service employee, notwithstanding that the employee had filed and was participating in a wage earner's plan under the Bankruptcy Act, where the Service had repeatedly warned the employee about his indebtedness prior to the filing for bankruptcy); *Jenkins v. Macy*, 357 F.2d 62 (8th Cir. 1966) (upholding the discharge of a General Services Administration employee for indebtedness where GSA had received 40 complaints concerning the indebtedness of the employee over a three year period); and *McEachern v. Macy*, 341 F.2d 895 (4th Cir. 1965) (upholding the discharge of a GSA employee charged with eight specific counts of financial irresponsibility).

21. *See* Appendix 8.

22. *See* Appendix 9.

of his assets in the 1978 bankruptcy. The interviewing agents noted that petitioner "appeared incredulous that the Service should reproach [bankruptcy] action on his part."[23]

Every government employee who files for bankruptcy has "excessive indebtedness." Under the Court of Claims decision, an employer desiring to discriminate against an employee for filing bankruptcy may do so merely by stating that the termination was not because the employee filed for bankruptcy but because of the employee's "excessive indebtedness." This has the effect of eliminating the availability to the employee of the opportunity for a fresh start. If the employee makes arrangements to pay some creditors certain discharged debts, the creditors may agree not to make a complaint to the federal employer. If he rests on his rights, the creditor will show no mercy. Bankruptcy is useless as a means of getting away from this pressure. The debtor can only save his job by making peace with the creditor, which is a long way from being "unhampered by the pressure and discouragement of pre-existing debt." *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934).

Where one's livelihood depends upon retention of a job, the debtor or bankrupt is at the creditor's mercy. Even after discharge, the creditor can demand payment in full or report the employee to his employer for "indebtedness." Bankruptcy is not then the sanctuary for the hapless debtor which Congress intended. The bankrupt, instead of receiving by virture of his discharge a "fresh start," finds himself still nevertheless confronted by his creditor. Worse, the employee can find himself entangled with his employer just by filing the bankruptcy petition, which is taken as proof of "excessive indebtedness" justifying immediate summary termination. In practical effect, the employee may be in as bad, or even worse, a position under the Court of Claims decision than if the Congress had permitted a creditor to attach his future wages, which Congress has prohibited.

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23. *Id.*

There are sufficient means by which the INS can protect itself from financially irresponsible employees without running roughshod over the immunities that the United States has chosen to give all its citizens.

In *Perez*, this Court made clear that it is the *effect* of an action that determines whether there is a conflict with bankruptcy policy. In the present case, the effect of petitioner's termination is to discipline him for resorting to bankruptcy for relief from his indebtedness. Even if government employees are assured that they cannot be fired for the stated reason of filing bankruptcy, they can have no assurance under the Court of Claims decision that a bankruptcy petition will not be used by the employer to initiate termination of employment for "excessive indebtedness." The Supreme Court should review this conflict between the Court of Claims decision and the doctrine of *Perez* as codified in 11 U.S.C. § 525.

II. The Decision of the Court of Claims Decreases the Availability of the Fresh Start Doctrine to a Substantial Segment of the Federal Workforce.

The increasing indebtedness of American consumers was evident to Congress when it passed the Bankruptcy Reform Act of 1978. As Congressman James O'Hara noted in response to proposed legislation exempting student loans from discharge in bankruptcy,

> Students are, indeed, going bankrupt in larger numbers than they used to. So are college presidents, garage owners, Federal and State civil servants, the owners of homes financed by government-guaranteed loans, and every class of borrowers in the society. Bankruptcy is a growing phenomenon.[24]

H.R. Rep. at 6108.

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24. For a well-documented review of the causes of bankruptcy and of the techniques employed by the consumer credit industry to keep consumers at the brink of bankruptcy, *see* the statement of David H. Williams, Attorney, Bureau of Consumer Protection, Federal Trade Commission, reported in 1978 U.S. Code Cong. & Ad. News 6127.

Since passage of the Reform Act in 1978, the number of non-business bankruptcies has increased dramatically. From 1978 to 1980 the number rose from 172,423 to 314,875.[25] During the same period, the number of government workers increased from 15,672,000 to 16,249,000.[26] While statistics are not available to indicate the number of government employees filing bankruptcy, such employees are likely no less subject to the perils of indebtedness and bankruptcy than other Americans. But Congress has accorded each of these employees protection from discriminatory treatment for resorting to the bankruptcy laws by 11 U.S.C. § 525.

However, under the Court of Claims decision, federal employees subject to an indebtedness rule similar to that of the INS[27] will not have the full opportunity for a fresh start in the event they should declare bankruptcy, because of the risk that the Government will take away their livelihood based upon the "excessive indebtedness" that resulted in the bankruptcy. The result, ironically, is to defeat the purposes of rules on indebtedness and of the fresh start doctrine. In making bankruptcy available only at the risk of being terminated for the antecedent indebtedness, the Court of Claims decision increases an employee's susceptibility to corruption attempts in order both to deal with unmanageable debts and to hold his job. As the district court observed in *Rutledge v. City of Shreveport*, 387 F. Supp. 1277 (W.D. La. 1975), such a rule

> does not achieve the purpose of *preventing* excessive debt, but rather *locks in* the evil which the rule intended

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25. 1980 Ann. Rep. of the Director of the Administrative Office of the United States Courts, 8.

26. 29 Dept. of Labor, *Employment and Earnings*, No. 4 at 73 (April 1982). This increase represents merely the end of a dramatic rise in government employment. Between 1930 and March 1981 the total number of government employees increased from 3,148,000 to 16,204,000.

27. The Postal Service, Office of Personnel Management, and General Services Administration have similar regulations. *See* 39 C.F.R. § 447.26 (1981); 5 C.F.R. § 735.207 (1982); General Services Administration Standard of Conduct Order ADM 6240.4 ¶ 102, November 30, 1979.

> to alleviate as the rule does not prohibit or hinder [a government employee] from *incurring* excessive debt but rather prevents the [employee] from *discharging* his excessive debt burden by filing a voluntary petition in bankruptcy. Therefore, the [employee] is left with the excessive debts and continues for that reason, to be prone to accept bribes and other gratuities, whereas if the [employee] could have his debts discharged in bankruptcy, then the temptations mentioned above would be removed.

387 F. Supp. at 1278-79.

The dilemma that the Court of Claims decision creates for federal employees subject to an indebtedness rule also reduces the likelihood that this issue will be as clearly presented to this Court again. If the decision of the Court of Claims were to become final, the effect of that decision will be to reduce substantially the filing of bankruptcy by federal employees, thus reducing correspondingly the likelihood of the issue of availability of the fresh start doctrine to federal employees reaching this Court. The Court should grant the petition for writ of certiorari because of the importance of the fresh start and nondiscrimination policies underlying the Bankruptcy Act, as enunciated in *Perez* and codified in 11 U.S.C. § 525, and because the Court of Claims decision ignores the effect of petitioner's discharge on the future availability of these fundamental policies to the federal government workforce.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Claims.

Respectfully submitted,

By HAROLD H. GREEN
MacDONALD, HOAGUE & BAYLESS
1500 Hoge Building
Seattle, Washington 98104
(206) 622-1604

J. BYRON HOLCOMB
SIQUELAND & HOLCOMB
1200 Westlake Avenue North
Suite 801
Seattle, Washington 98109
(206) 283-6069
Counsel for Petitioner

June 17, 1982.

APPENDIX 1

IN THE UNITED STATES COURT OF CLAIMS

No. 44-80C

DOYLE WAIDE	)	
	)	Civilian pay; discharge
v.	)	of probationary employee
	)	for excessive indebted-
THE UNITED STATES	)	ness.

J. Byron Holcomb, attorney of record, for plaintiff.

Gerald L. Elston, with whom was Assistant Attorney General J. Paul McGrath, for defendant.

Before FRIEDMAN, Chief Judge, KUNZIG and BENNETT, Judges.

ORDER

In this civilian pay case, plaintiff seeks review of a Federal Employee Appeals Authority (FEAA) decision[1/] affirming his dismissal from his position as a probationary Border Patrol Agent with the Immigation

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1/ FEAA Decision No. SF315H80068 (Sept. 22, 1978).

and Naturalization Service (INS). Subsequent to the FEAA decision, plaintiff filed a motion with the Merit Systems Protection Board (MSPB), the successor to the FEAA, to reconsider the FEAA's decision. Upon review of the record, the MSPB denied plaintiff's request to reopen the FEAA decision. Plaintiff then timely filed suit in this court seeking reinstatement, back pay, and other relief based on various alleged procedural and substantive defects in the removal decision. The case is now before us on cross-motions for summary judgment. We grant the government's motion for summary judgment and dismiss plaintiff's petition.

On July 31, 1977, plaintiff received a career-conditional appointment with the INS as a Border Patrol Agent, subject to the satisfactory completion of a one-year probationary period. Several days before

the end of his probationary period plaintiff received notice that he was being terminated, effective July 29, 1978, because of excessive indebtedness which reflected unfavorably upon the INS and the Government as his employer. The letter to plaintiff concluded, "The fact that you allowed yourself to incur debts to the point that you were not able to discharge them shows that you lack the judgment required of an officer of this Service." The record indicates that plaintiff had declared bankruptcy in 1971 and had filed for bankruptcy a second time on May 2, 1978.

Plaintiff vigorously contends that his dismissal was due to his filing for bankruptcy on May 2, 1978, in violation of his constitutional and statutory right to declare bankruptcy. We conclude, however, as the FEAA held, that plaintiff was

dismissed not for filing a bankruptcy petition, but because his continued excessive indebtedness reflected unfavorably upon the INS and the Government.[2/] The filing of the bankruptcy petition brought plaintiff's indebtedness to the INS's attention, but it was not the reason for his discharge. As an INS employee, plaintiff was bound to comply with the Border Patrol Handbook, Section 3-13, regarding the subject of indebtedness. The Handbook states in part:

2/ The notes accompanying a section of the Bankruptcy Reform Act of 1978, 11 U.S.C. § 525 (Supp. IV 1980) (which is not applicable to this case), make it clear that § 525 is intended to prohibit an employee's termination "based solely on the basis of the bankruptcy, on the basis of insolvency before or during bankruptcy prior to a determination of discharge or on the basis of nonpayment of a debt discharged in the bankruptcy case (the Perez situation). It does not prohibit consideration of other factors, such as future financial responsibility or ability, and does not prohibit imposition of requirements such as net capital rules, if applied nondiscriminatorily." (Emphasis added.)

> Failure on the part of an officer to pay his just debts quickly, will bring the Service into disrepute very quickly. As a part of his responsibility to conduct himself properly, an agent is expected to attend promptly to his personal financial obligations. Failure to do so may be deemed sufficient cause for disciplinary action, the most serious of which can be dismissal.

The federal courts have upheld reasonable, understandable personnel policies which govern the conduct of government employees. Ricci v. United States, 205 Ct. Cl. 687, 701, 507 F.2d 1390, 1398 (1974), citing United States Civil Service Comm. v. National Assoc. of Letter Carriers, 413 U.S. 548 (1973). Additionally, there is compelling authority which indicates that federal agencies may consider the fiscal responsibility of their employees when making personnel decisions. Marshall v. District of Columbia Gov't., 559 F.2d 726, 729 (D.C. Cir. 1977); Dennis v. Blount, 497 F.2d 1305, 1307 (9th Cir. 1974). Robinson v. Blount, 472 F.2d 839,

843 (9th Cir. 1973). This policy is particularly appropriate when the employees are possible bribery targets. Like the police officer in Marshall, supra, a Border Patrol Agent who is unable to manage his financial affairs exposes himself to corruption attempts.

It is significant that plaintiff was still in a probationary status at the time of his dismissal. It is now well settled that our review of the discharge of a probationary employee is quite limited. Shaw v. United States, 223 Ct. Cl. ___, ___, 622 F.2d 520, 527 (1980), citing Perlongo v. United States, 215 Ct. Cl. 982, 566 F.2d 1192 (1977), cert. denied, 436 U.S. 944 (1978); Dargo v. United States, 176 Ct. Cl. 1193, 1205 (1966), citing Bander v. United States, 141 Ct. Cl. 373, 157 F. Supp. 564, cert. denied, 358 U.S. 855 (1958). In this case, the INS

acted to rid itself of an employee whose financial situation made him an undesirable Border Patrol Agent. We simply do not find this action arbitrary, capricious, or unsupported by substantial evidence.

Plaintiff urges this court to find that his termination resulted from pre-appointment debts and that our decision in Cohen v. United States, 181 Ct. Cl. 400, 384 F.2d 1001 (1965), requires the INS to comply with 5 C.F.R. § 315.805, which sets forth procedures for the termination of probationers for pre-appointment conditions. We need not quarrel with plaintiff's interpretation of Cohen because we find that plaintiff's termination resulted from post-appointment circumstances. Even accepting plaintiff's assertion that all of his debts arose prior to his time of employment with INS, he was discharged for allowing those debts to continue during the first nine months of his probationary

period. The stated ground for his termination was chronic indebtedness which reflected unfavorably upon the INS and Government as his employer. As we noted in Cohen, "Those employees who cannot properly shoulder the normal burdens of their position in this one-year period are ordinarily to be separated rather summarily." 181 Ct. Cl. at 405, 384 F.2d at 1003-04, citing Greenway v. United States, 163 Ct. Cl. 72, 75 (1963). Moreover, the record indicates that plaintiff made little or no effort during his probation to pay back his creditors.

The facts of plaintiff's continuing indebtedness and the lack of any demonstrated attempts to make any effort to pay creditors or to work out some financial arrangements with them all constitute post-appointment conditions. For this reason, we conclude that the INS was not required to comply with the procedures in 5

C.F.R. § 315.805 regarding terminations for pre-appointment conditions. We find that plaintiff's termination was in compliance with the procedures governing the termination of probationary employees for post-appointment conditions.[3/]

The Ninth Circuit held in Dennis v. Blount, supra, that "[t]he Post Office can take into account the failure of its employees to pay their just debts." 497 F.2d at 1307. We adopt a similar position as regards the INS decision to terminate plaintiff in this case. Indeed, the policy enunciated in Dennis v. Blount applies to this case with at least equal if not

---

3/ 5 C.F.R. § 315.804 sets forth the required procedures for terminating a government employee for unsatisfactory performance or conduct during his probationary period. The regulation provides in part that the agency "shall terminate his services by notifying him in writing as to why he is being separated and the effective date of the action." The two-page INS termination letter of July 26, 1978, clearly met the requirements of the applicable regulation quoted above.

greater force in view of the fact that plaintiff was responsible, in his position as a Border Patrol Agent in the San Diego area, for preserving this nation's borders against illegal traffic in drugs and aliens. In summary, we conclude that Mr. Waide was fired not for filing bankruptcy but for chronic indebtedness which violated INS employment policies and reflected unfavorably upon the INS and Government as his employer.

Accordingly, IT IS THEREFORE ORDERED, after consideration of the submissions of the parties, with oral argument of counsel, that plaintiff's motion for summary judgment is denied. Defendant's motion for summary judgment is granted. Plaintiff's petition is dismissed.

BY THE COURT

JAN 29 1982

s/Robert L. Kunzig
Robert L. Kunzig
Judge

APPENDIX 2

UNITED STATES CIVIL SERVICE COMMISSION
FEDERAL EMPLOYEE APPEALS AUTHORITY

San Francisco Field Office
450 Golden Gate Avenue
San Francisco, California 94102

APPEAL OF DOYLE E. WAIDE UNDER SUBPART H
OF PART 315 OF THE
CIVIL SERVICE REGULATIONS

DECISION NO: SF315H80068
DECIDED ON: SEP 22, 1978

INTRODUCTION

By letter dated August 4, 1978, Mr. Doyle E. Waide (appellant) appealed the decision of the Department of Justice, Immigration and Naturalization Service, San Pedro, California (agency), which terminated him from his position of Border Patrol Agent, GS-01896-7, Step 1, $12,336 per annum, during his probationary period, effective July 29, 1978.

Appellant had received a Part 315 career-conditional appointment to the position of Border Patrol Agent, GS-7, effective July 31, 1977, subject to satisfactory completion of a 1-year probationary

period commencing that date. By letter dated July 26, 1978, appellant was notified that he was being terminated, effective midnight, July 29, 1978, because of excessive indebtedness which reflected unfavorably upon the agency and Government as his employer. The termination was effected 1 day short of completion of the probationary period.

JURISDICTION

Section 315.804 of the Commission's regulations provides that when an agency decides to terminate an employee serving a probationary period because his work performance or conduct during this period fails to demonstrate fitness or qualifications for continued employment, it shall terminate his services by notifying him in writing of the reason for the termination and the effective date. The record shows that the agency, by its letter of July 26,

1978, informed appellant of the reason and effective date of his termination.

Appellant alleges that the termination action was procedurally defective because he was not given an advance notice of the proposed adverse action nor an opportunity to reply as required by Section 315.805 of the Civil Service regulations pertaining to termination of probationers for conditions arising before appointment. The record shows, however, that appellant was terminated because of excessive indebtedness which came to the agency's attention in July 1978 (over 11 months after his appointment) as the result of bankruptcy filings earlier in 1978. The termination was therefore based on a post-appointment reason and, accordingly, Section 315.805 of the Commission's regulations was not applicable.

Section 315.806 of the Commission's regulations provides that an employee may

appeal to the Commission, in writing, an agency's decision to terminate him under Section 315.804, noted above. However, the scope of the Commission's review is limited to allegations of prohibited discrimination, to wit: race, color, religion, sex, age, national origin, marital status, partisan political reasons, or physical handicap. There is no provision for a review of the sufficiency of the reasons (merits) or the procedures utilized for the termination.

In his appeal, appellant took issue with the agency's stated reasons for his termination and the penalty imposed. However, he did not raise any specific allegation of prohibited discrimination. Therefore, appellant raised no issue adjudicable under 5 CFR 315.806.

DECISION

Absent any allegation of prohibited discrimination, there is no matter presented by this appeal within the purview of Part 315H of the Civil Service regulations.

This decision is final and there is no further right of appeal. This means that the decision of the Appeals Officer marks the exhaustion of those administrative remedies which must precede resort to the courts. However, Section 772.310 of the Civil Service regulations permits the Commission's Appeals Review Board, in its discretion, and notwithstanding the exhaustion of the right of appeal or the pendency of suit, to reopen and reconsider any previous decision of an Appeals Officer when the party requesting reopening submits written argument or evidence which tends to establish that:

(1) New and material evidence is available that was not readily available when the decision of the Appeals Officer was issued;

(2) The previous decision of the Appeals Officer involves an erroneous interpretation of law or regulation, or a misapplication of established policy; or

(3) The decision of the Appeals Officer is of a precedential nature involving new or unreviewed policy considerations that may have effect beyond the case at hand.

If the agency has evidence or argument which it believes meets one or more of these criteria, it must submit that information and, where appropriate, evidence of

temporary or conditional compliance with this decision, not later than 30 days after receipt of the decision.

If appellant has evidence or argument which is believed to meet one or more of these criteria, that information must be submitted within a reasonable time after receipt of this decision.

Such request should be sent to:

CHAIRMAN
APPEALS REVIEW BOARD
U.S. CIVIL SERVICE COMMISSION
WASHINGTON, D.C. 20415

FOR THE COMMISSION:

s/John F. Oldfield
JOHN F. OLDFIELD
CHIEF APPEALS OFFICER

APPENDIX 3

Washington, D.C. 20419

MERIT SYSTEMS PROTECTION BOARD

June 22, 1979

William F. Woods, Esq.
San Diego Legal Clinic of
Ruben & Woods
3596 Fifth Avenue
San Diego, California 92103

Dear Mr. Woods:

This is in reference to your letter of November 27, 1978, requesting the Appeals Review Board (now Office of Appeals Review, Merit Systems Protection Board) to reopen and reconsider the September 22, 1978 decision of the San Francisco Field Office, Federal Employee Appeals Authority (now Office of Appeals Operations, Merit Systems Protection Board), issued in the case of Mr. Doyle E. Waide.

Sections 772.310 and 772.312 of Title 5, Code of Federal Regulations, set forth the regulatory criteria for reopening the previous decision of an Appeals Officer. Under those sections, the party requesting reopening and reconsideration must submit written evidence or argument which tends to meet one or more of the regulatory criteria.

The Board has carefully reviewed your request, the Field Office decision, and the entire appellate record. Based on this review, the Board finds that your request does not meet any of the regulatory criteria of Sections 772.310 or 772.312 of the regulations. Therefore, the request to reopen the Field Office decision is denied, and that decision remains the final decision in this matter.

There is no further right of administrative appeal from a decision of the Merit Systems Protection Board on a request for reopening. This case is considered to be closed in this office since all administrative appeal rights have been exhausted. Any further remedy available lies in the court system.

For the Board:

Sincerely yours,

s/Cameron C. Smith
Cameron C. Smith,
Acting Director
Office of Appeals Review

cc: Mr. Doyle E. Waide
2371 Grove Avenue #9
San Diego, California 92154

Chief, IMR Group
Personnel & Training Staff
Main Justice Bldg., Room 1337
Washington, D.C. 20530

Merit Systems Protection Board
San Francisco Field Office
Federal Building
Box 36010
450 Golden Gate Avenue
San Francisco, California 94102

APPENDIX 4

IN THE UNITED STATES COURT OF CLAIMS

March 19, 1982

ORDER

PER CURIAM: IT IS ORDERED that the motions of the parties as set forth, for rehearing, reconsideration or other relief under Rules 7(d), 151 and 152 are DENIED:

44-80C Doyle Waide
Plaintiff's motion filed March 2, 1982 for reconsideration of order dated January 29, 1982. (FRIEDMAN, Chief Judge & BENNETT, Judge)

APPENDIX 5

CODE OF FEDERAL REGULATIONS
5. C.F.R. (1982)

SUBPART H - PROBATION ON INITIAL APPOINTMENT TO A COMPETITIVE POSITION

§ 315.801 Probationary period; when required.

(a) The first year of service of an employee who is given a career or career-conditional appointment under this part is a probationary period when the employee:

(1) Was appointed from a register.

§ 315.802 Length of probationary period.

(a) The probationary period required by § 315.801 is 1 year.

(b) OPM shall publish in the Federal Personnel Manual a statement of the conditions under which prior service is counted toward completion of a probationary period.

§ 315.803 Agency action during probationary period (general).

The agency shall utilize the probationary period as fully as possible to determine the fitness of the employee and

shall terminate his services during this period if he fails to demonstrate fully his qualifications for continued employment.

§ 315.804 Termination of probationers for unsatisfactory performance or conduct.

When an agency decides to terminate an employee serving a probationary or trial period because his work performance or conduct during this period fails to demonstrate his fitness or his qualifications for continued employment, it shall terminate his services by notifying him in writing as to why he is being separated and the effective date of the action. The information in the notice as to why the employee is being terminated shall, as a minimum, consist of the agency's conclusions as to the inadequacies of his performance or conduct.

§ 315.806 Appeal rights to the Merit Systems Protection Board.

(a) Right of appeal. An employee may appeal to the Merit Systems Protection

Board in writing an agency's decision to terminate him under § 315.804 or § 315.805 only as provided in paragraphs (b) and (c) of this section. The Merit Systems Protection Board review is confined to the issues stated in paragraphs (b) and (c) of this section.

(b) On discrimination. An employee may appeal under this paragraph a termination not required by statute which he or she alleges was based on partisan political reasons or marital status.

(c) On improper procedure. A probationer whose termination is subject to § 315.805 may appeal on the ground that his termination was not effected in accordance with the procedural requirements of that section.

(d) An employee may appeal to the Board under this section a termination which the employee alleges was based on discrimination because of race, color, religion, sex, or national origin; or age, provided that at the time of the alleged discriminatory action the employee was at least 40 years of age; or physical handicap, only if such discrimination is raised in addition to one of the issues stated in paragraph (b) or (c) of this section.

APPENDIX 6

Section 3-13

BORDER PATROL HANDBOOK OF THE UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE (INS)

INDEBTEDNESS

Failure on the part of an officer to pay his just debts quickly, will bring the Service into disrepute very quickly. As a part of his responsibility to conduct himself properly, an agent is expected to attend promptly to his personal financial obligations. Failure to do so may be deemed sufficient cause for disciplinary action, the most serious of which can be dismissal.

The Service will not act as a collection agency for an outside organization, however, supervisors are required to act promptly, fairly, and decisively on every complaint received from creditors of

employees to the end that just obligations are resolved satisfactorily. In the case of a chronic offender, or if other circumstances warrant, disciplinary action will be initiated under Service procedures.

APPENDIX 7

SERVICE MANUAL OF THE INS
(at p. M-68)

INDEBTEDNESS

As a part of your obligations to conduct yourself so as to reflect favorably on the Service, you are expected to attend properly and promptly to your personal obligations.

APPENDIX 8

WESTERN REGIONAL OFFICE
TERMINAL ISLAND
SAN PEDRO, CALIFORNIA 90731

July 26, 1978

Doyle E. Waide
c/o Immigration and Naturalization
Service
Chula Vista, California

Dear Mr. Waide:

It has been determined that it is necessary to terminate your employment during your probationary period as a Border Patrol Agent, GS-7, with the Immigration and Naturalization Service.

This action is necessary because of your excessive indebtedness which reflects unfavorably upon this Service and further reflects adversely upon the Government, as your employer. The fact that you allowed yourself to incur debts to the point that you were not able to discharge them shows that you lack the judgment required of an officer of this Service.

In view of the foregoing, your separation will be effective 12:00 o'clock, midnight, July 29, 1978.

If you believe this action is being taken against you as a result of discrimination because of race, color, religion, sex, national origin, or age, you have the right to file a discrimination complaint under either Part 713 or Part 315H of the Civil Service Commission regulations. Procedures for filing a discrimination complaint under

either one of these regulations are contained in the attached. Also, if you believe this action is being taken against you because of partisan political reasons, marital status, mental handicap, or physical handicap, you have a right to appeal the matter to the Federal Employee Appeals Authority, U.S. Civil Service Commission, 450 Golden Gate Avenue, San Francisco, California 94102, under Part 315H of the regulations. Such an appeal must be in writing, stating the basis for your allegation, and forwarded to the Commission no later than fifteen days after the separation is effected.

A copy of this letter has been made a part of your Official Personnel Folder.

Attached is Standard Form 2802, Application for Refund of Retirement Deductions, in the event you desire to make application for refund. You will be paid in lump sum for accrued annual leave, if any, remaining to your credit as of July 29, 1978.

s/ Illegible
Acting Assistant Regional Commissioner
Personnel

Attachment

Receipt of the original notice is hereby acknowledged. It was delivered on 7-28-78 at 3:38 pm.

Signature s/ D. E. Waide

Signature s/ Illegible
Witness/Bearer

APPENDIX 9

UNITED STATES GOVERNMENT
MEMORANDUM

CHU 40/47.1-C
Date: July 27, 1978

TO: Regional Commissioner (ROPER)
Western Region

FROM: Chief Patrol Agent
Chula Vista, California

SUBJECT: Border Patrol Agent (Trainee)
Doyle E. Waide - Indebtedness

Doyle E. Waide was interviewed by Assistant Chief Patrol Agent R. Jones at Border Patrol Sector Headquarters on Thursday, July 27, 1978 at approximately 3:15 p.m., as it related to his indebtedness and his having filed a bankruptcy in the United States District Court for the Southern District of California, San Diego, California.

Participating and witnessing the interview were Deputy Regional Chief, Border Patrol, Paul McClure, from the Western Region and Supervisory Border Patrol Agent Alton B. Chapman, Chula Vista Border Patrol Station.

Mr. Waide primarily was advised of the reason for the interview and read the appropriate section of the Border Patrol Handbook as it relates to indebtedness (3-13 of Border Patrol Handbook). He affirmed that he was and had been aware of this provision. Subsequently, he was asked about his personal need and reason for petitioning the Court for relief by bankruptcy action. He responded, that it was a legal means to resolve his debts and was necessary to keep his creditors from coming

to his place of employment and to sustain his family.

He was asked if he had attempted to resolve his indebtedness by consolidating his debts and negotiating a loan to cover this amount. In response he claimed to have attempted to borrow money at the local credit union and was denied because of the currently pending and a previous bankruptcy in November 1971 in Washington State. It is noted from his statement, that no apparent attempt was made to borrow money, until after he had filed for bankruptcy in May 1978.

Agent Waide was asked about his previous bankruptcy in 1971 and if he listed this in any of his pre-employment documents. He responded that he could not remember but he had not attempted to conceal the fact. He was further asked if any attempt had been made to make restitution, by him, to his creditors after this bankruptcy in 1971. His response was to the negative.

Border Patrol Agent Waide indicated that from the list of secured notes in the current bankruptcy action; he has re-affirmed that he owed and would continue to pay on the loans against his vehicles, a 1971 Pontiac sedan and a 1969 Chevrolet pickup truck. Subsequently he will keep possession of these vehicles with the other secured property being repossessed by the holders of the notes. He further stated that when filing bankruptcy, the petitioner is allowed to keep items relating to work, clothes, cooking utensils, etc., all other items are turned to a Court appointed trustee, to be converted to money and equitably distributed to his creditors of unsecured notes.

Doyle Waide is adamant in his resentment that he should be questioned about a present or past bankruptcy action; stating several times during the interview "It was a legal means to satisfy my creditors", apparently incredulous that the Service should reproach such an action on his part.

Border Patrol Agent (Trainee) Waide was informed, that as a result of the interview and in view of his continuing chronic reoccurring indebtedness, it would be recommended that he be terminated.

The Employee Relations Unit, Western Region, was advised telephonically at 3:45 p.m., on July 27, 1978, of the results of the interview.

s/Donald M. Cameron

APPENDIX 10

Legislative History of the Bankruptcy Reform Act of 1978 S. Rep. No. 989, 95th Cong., 2d Sess. 81, reprinted in 1978 U.S. Code Cong. & Ad. News 5787. H.R. Rep. No. 595, 95th Cong. 2d Sess. 366, reprinted in 1978 U.S. Code Cong. & Ad. News 5963.

This section is additional debtor protection. It codifies the result of Perez v. Campbell, 402 U.S. 637 (1971), which held that a State would frustrate the Congressional policy of a fresh start for a debtor if it were permitted to refuse to renew a drivers license because a tort judgment resulting from an automobile accident had been unpaid as a result of a discharge in bankruptcy.

Notwithstanding any other laws, section 525 prohibits a governmental unit from denying, revoking, suspending, or refusing to renew a license, permit, charter, franchise, or other similar grant to, from conditioning such a grant to, from discrimination with respect to such a grant against, deny employment to, terminate the

employment of, or discriminate with respect to employment against, a person that is or has been a debtor or that is or has been associated with a debtor. The prohibition extends only to discrimination or other action based solely on the basis of the bankruptcy, on the basis of insolvency before or during bankruptcy prior to a determination of discharge, or on the basis of nonpayment of a debt discharged in the bankruptcy case (the Perez situation). It does not prohibit consideration of other factors, such as future financial responsibility or ability, and does not prohibit imposition of requirements such as net capital rules, if applied nondiscriminatorily.

In addition, the section is not exhaustive. The enumeration of various forms of discrimination against former bankrupts is not intended to permit other forms of discrimination. The courts have

been developing the Perez rule. This section permits further development to prohibit actions by governmental or quasi-governmental organizations that perform licensing functions, such as a State bar association or a medical society, or by other organizations that can seriously affect the debtors' livelihood or fresh start, such as exclusion from a union on the basis of discharge of a debt to the union's credit union.

The effect of the section, and of further interpretations of the Perez rule, is to strengthen the anti-reaffirmation policy found in section 524(b). Discrimination based solely on nonpayment could encourage reaffirmations, contrary to the expressed policy.

The section is not so broad as a comparable section proposed by the Bankruptcy Commission, H.R. 31, 94th Cong., 1st

Sess. § 4-508 (1975), [S. 236, 94th Cong., 2st Sess. § 4-508 (1975)], which would have extended the prohibition to any discrimination, even by private parties. Nevertheless, it is not limiting either, as noted. The courts will continue to mark the contours of the anti-discrimination provision in pursuit of sound bankruptcy policy.

H. R. Rep. at 6126.

E. PROTECTION AGAINST DISCRIMINATING TREATMENT

The bill codifies another important debtor protection, first enunciated by the Supreme Court in 1971 in the case of Perez v. Campbell.[119] In that case, Arizona refused to renew a drivers license because the driver had been in an automobile accident, had been sued as a result, and lost. The driver was uninsured. He filed bankruptcy and the tort judgment was discharged. Arizona had a general policy forbidding a drivers license to any motorist that failed to pay a tort judgment arising out of an automobile accident. The Supreme Court held that if such policy were

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[119] 402 U.S. 637 [91 S. Ct. 1704, 29 L. Ed. 2d 233.] (1971).

applied to include nonpayment by reason of a discharge in bankruptcy, the policy would run afoul of the Federal bankruptcy policy of ensuring the debtor in a bankruptcy case a fresh start. The Court ordered the license issued.

Similar discrimination has occurred in other areas as well. Municipalities have occasionally dismissed employees such as firemen or policemen because of a bankruptcy.[120] Nonpayment of a debt to a credit union has occasionally resulted in loss of a job.[121] Various State and Federal laws automatically deny certain

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[120] Rutledge v. City of Shreveport, 387 F. Supp. 1277 (W.D. La. 1975); In re Loftin, 327 So. 2d 543 (La. App. 1976).

[121] See In re Shargel, 2 Bankr. Ct. Dec. 1282 (C.D. Cal. 1976) (Moriarty, bankruptcy judge).

licenses to an individual solely on the basis of a bankruptcy.[122]

These practices are seriously detrimental to a debtor's fresh start, and are contrary to bankruptcy policy. The courts have followed the Perez doctrine in some of these instances, and have restored bankrupts to positions from which they were excluded because of the bankruptcy. The doctrine is a developing doctrine, and its precise ultimate contours are not yet clear. More case law will undoubtedly develop the extent of the discrimination that is contrary to bankruptcy policy.

Nevertheless, the bill codifies one important aspect of the protection against discriminatory treatment. H.R. 8200 prohibits action by a governmental

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[122] See, e.g., Perishable Agricultural Commodities Act § 4(e), 7 U.S.C. 499d(e) (1970).

unit, such as the Federal Government, a State, a city, or any governmental agency, that is based solely on the basis of a filing under proposed title II, the bankruptcy code.[123] The prohibition does not extend so far as to prohibit examination of the factors surrounding the bankruptcy, the imposition of financial responsibility rules if they are not imposed only on former bankrupts, or the examination of prospective financial condition or managerial ability. The purpose of the section is to prevent an automatic reaction against an individual for availing himself of the protection of the bankruptcy laws. Most bankruptcies are caused by circumstances beyond the debtor's control.[124] To penalize a

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[123]H.R. 8200 § 101 (proposed 11 U.S.C. 525).

[124]COMMISSION REPORT, pt. I, at 33-59.

debtor by discriminatory treatment as a result is unfair and undoes the beneficial effects of the bankruptcy laws. However, in those cases where the causes of a bankruptcy are intimately connected with the license, grant, or employment in question, an examination into the circumstances surrounding the bankruptcy will permit governmental units to pursue appropriate regulatory policies and take appropriate action without running afoul of bankruptcy policy.

Office - Supreme Court, U.S.
FILED
AUG 20 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2321

In the Supreme Court of the United States

OCTOBER TERM, 1982

DOYLE E. WAIDE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

WILLIAM KANTER
RUSSELL L. CAPLAN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the Court of Claims correctly held that the Immigration and Naturalization Service did not violate Section 525 of the Bankruptcy Reform Act of 1978 in dismissing petitioner from his probationary position as Border Patrol Agent on the ground of excessive indebtedness.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2321

DOYLE E. WAIDE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Claims (Pet. App. A-1 to A-10) is not reported. The decision of the Federal Employee Appeals Authority (Pet. App. A-11 to A-17) is not reported.

JURISDICTION

The order of the Court of Claims was entered on January 29, 1982. Petitioner's motion for rehearing was denied on March 19, 1982 (Pet. App. A-20). The petition for a writ of certiorari was filed on June 17, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

STATEMENT

1. On July 31, 1977, petitioner received a career-conditional appointment as a Border Patrol Agent with the Immigration and Naturalization Service (INS), subject to satisfactory completion of a one-year probationary period

(Pet. App. A-2). On July 26, 1978, prior to completion of his probationary period, the INS informed petitioner in writing (*id.* at A-28 to A-29) that his employment would be terminated, effective July 29, 1978, because of

> your excessive indebtedness which reflects unfavorably upon this Service and further reflects adversely upon the Government, as your employer. The fact that you allowed yourself to incur debts to the point that you were not able to discharge them shows that you lack the judgment required of an officer of this Service.

Petitioner's discharge was based on Section 3-13 of the Border Patrol Handbook of the INS (Pet. App. A-25), which reads as follows:

> Failure on the part of an officer to pay his just debts quickly, will bring the Service into disrepute very quickly. As a part of his responsibility to conduct himself properly, an agent is expected to attend to his personal financial obligations. Failure to do so may be deemed sufficient cause for disciplinary action, the most serious of which can be dismissal.

Moreover, the Service Manual of the INS (*id.* at A-27) states: "As part of your obligations to conduct yourself so as to reflect favorably on the Service, you are expected to attend properly and promptly to your personal obligations."

The record indicates that petitioner had declared bankruptcy in 1971 and had filed for bankruptcy a second time in May 1978 (Pet. App. A-3). After INS officials learned of petitioner's May 1978 filing, he was interviewed concerning the circumstances surrounding his indebtedness and bankruptcy. When questioned about whether he had attempted to resolve his indebtedness by consolidating his debts and negotiating a loan to cover them, petitioner indicated that he had made one unsuccessful attempt to do so, but that

attempt apparently was not made until after he had filed for bankruptcy in May 1978 (*id.* at A-31).

2. Petitioner appealed his dismissal to the Federal Employee Appeals Authority, which upheld his discharge (Pet. App. A-15). After exhausting his administrative remedies,[1] petitioner filed suit in the United States Court of Claims, asserting various procedural and substantive defects in the decision to dismiss him and seeking reinstatement and back pay. Petitioner contended, *inter alia*, that his dismissal resulted from his May 1978 bankruptcy filing and therefore was in violation of his right to declare bankruptcy (*id.* at A-3).

The Court of Claims granted the government's motion for summary judgment and dismissed petitioner's action. The court concluded that petitioner had been dismissed "not for filing a bankruptcy petition, but because his continued excessive indebtedness reflected unfavorably upon the INS and the Government" (Pet. App. A-4). The court observed that the Bankruptcy Reform Act of 1978, 11 U.S.C. (Supp. IV) 525, was not applicable to petitioner's case, but that in any event the notes accompanying that section indicated that it was designed to prohibit an employee's termination based *solely* on bankruptcy and did not prohibit consideration of other factors, such as future financial responsibility or ability (Pet. App. A-4 n.2).[2] The

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[1]The FEAA found that petitioner had raised no adjudicable issue, since he had not alleged any prohibited discrimination (Pet. App. A-11, A-14). Petitioner requested reconsideration of the FEAA decision by the Merit Systems Protection Board, the successor agency to the FEAA. The Board, after review of the record, denied petitioner's request (*id.* at A-19).

[2]Section 525 provides in part that a governmental unit may not "terminate the employment of * * * a person that is or has been a * * * bankrupt or a debtor under the Bankruptcy Act * * * solely because such bankrupt or debtor is or has been * * * a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of

court noted that petitioner, as an INS employee, was bound to comply with the provision of the Border Patrol Handbook regarding indebtedness (*id.* at A-4). The court observed that there was compelling authority for the proposition that federal agencies may consider the fiscal responsibility of their employees when making personnel decisions and that such a policy was particularly appropriate when employees are possible bribery targets (*id.* at A-5 to A-6). Finally, the court concluded that petitioner had been terminated on the ground of post-appointment conditions—continuing indebtedness and failure to make any effort to pay creditors or to work out some financial arrangements with them—so that the INS was not required to follow certain procedures applicable to termination for pre-appointment conditions (*id.* at A-8).[3]

ARGUMENT

Petitioner contends that his dismissal contravenes federal bankruptcy policy. However, the Court of Claims correctly concluded that petitioner was dismissed not for filing a bankruptcy petition, but rather because of his continued excessive indebtedness, and that the latter cause constituted a proper ground for dismissal in view of the nature of petitioner's position. This decision, which does not conflict with the ruling of any other court, does not warrant further review.

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the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act."

[3]The court found that the termination letter sent to petitioner on July 26, 1978, met the requirements of the applicable regulation, 5 C.F.R. 315.804 (Pet. App. A-9 n.3). Petitioner has not raised in this Court any question concerning the procedures used in connection with his dismissal.

1. Petitioner urges that his dismissal violates the Bankruptcy Reform Act of 1978, 11 U.S.C. (Supp. IV) 525, which prohibits termination of employment solely because an individual is or has been a bankrupt or debtor under the federal bankruptcy statutes. However, Section 525 did not come into effect until October 1, 1979, more than a year after petitioner's dismissal. Thus, the Court of Claims correctly concluded that the section does not apply to petitioner's case (Pet. App. A-4 n.2).[4]

2. Even if Section 525 had been in effect at the time of petitioner's dismissal, there would have been no violation of the statute. The legislative history of the Bankruptcy Reform Act shows that Section 525 was designed to codify the principle articulated by this Court in *Perez* v. *Campbell*, 402 U.S. 637 (1971) (Pet. App. A-33, A-37). In *Perez*, the Court struck down the portion of the Arizona Motor Vehicle Safety Responsibility Act that required suspension of an individual's driver's license if a judgment resulting from an automobile accident remained unpaid, even after that judgment had been discharged in bankruptcy. The Court concluded that the effect of the provision was to frustrate the purpose of the Bankruptcy Act, which is to

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[4]Petitioner argues that Section 525 should be applicable because his action was filed in the Court of Claims in January 1980, after Section 525 had gone into effect (Pet. 5 n.13). However, it is the date of the alleged wrong that is significant, not the date the suit was filed.

give debtors "a new opportunity in life." 402 U.S. at 648, quoting *Local Loan Co.* v. *Hunt*, 292 U.S. 234, 244 (1934).

The statute at issue in *Perez* had both the purpose and effect of placing pressure on individuals to pay particular debts that had been discharged in bankruptcy. No such pressure is involved in petitioner's dismissal. The INS policy is directed toward preventing the accumulation of excessive indebtedness, not forcing repayment of debts that already have been discharged in bankruptcy. Moreover, the policy is not framed so as to discourage declaration of bankruptcy, but rather is designed to deter an individual from incurring indebtedness long before he reaches the point at which he is forced to declare bankruptcy and to identify those individuals whose chronic indebtedness reflects a lack of judgment.[5]

The principle underlying *Perez* does not suggest that an employer may never consider an employee's excessive indebtedness, merely because he has filed for banktruptcy. The "fresh start" policy, which was central to *Perez*, is not so broad as to require the INS to ignore petitioner's indebtedness in deciding whether he was fit for permanent employment as a Border Patrol Agent. Otherwise, an employee would be able to use a bankruptcy filing as a shield against any adverse action that an employer could take on the basis of the employee's indebtedness.[6] As the

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[5]See *In re Loftin*, 327 So.2d 543, 547 n.4 (La. Ct. App.), writ denied, 331 So.2d 851 (La. 1976), in which the court distinguished the rule prohibiting declaration of bankruptcy at issue in that case from a rule against incurring and failing to pay debts.

[6]See *In re Terry*, 7 Bankr. 880, 881-882 (Bankr. E.D. Va. 1980) (fact that bankruptcy may have triggered firing should not be used to forestall discharge that was otherwise due).

District of Columbia Circuit held in *Marshall* v. *District of Columbia Government*, 559 F. 2d 726, 729 (1977) (emphasis in original; footnote omitted), *Perez* does not even require an employer to ignore the bankruptcy itself as an indicator of an individual's qualifications for a sensitive position:

> The bankruptcy statute gives a bankrupt "a new opportunity in life and a clear field for future effort unhampered by the pressure and discouragement of preexisting debt" but it does not wipe out the *fact* of a prior bankruptcy. Nor does it prohibit employers from using the *fact* of bankruptcy in considering whether the past record of a job applicant merits his consideration for employment.[7]

In the present case the INS did not base its decision to dismiss on the fact of petitioner's bankruptcy filing alone, but rather looked to the overall circumstances of his excessive indebtedness.

The Senate report accompanying Section 525 indicates that the section was intended to prohibit an employee's termination "based *solely* on the basis of the bankruptcy, on the basis of insolvency before or during bankruptcy prior to a determination of discharge or on the basis of nonpayment of a debt discharged in the bankruptcy case." 11 U.S.C. (Supp. IV) 525 note (emphasis added), citing S. Rep. No. 95-989, 95th Cong., 2d Sess. (1978); Pet. App. A-34. The Senate report goes on to state that the section "does not prohibit consideration of other factors, such as future financial responsibility or ability." 11 U.S.C. (Supp. IV) 525 note. Thus, Section 525 does not prevent an employer from

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[7]Cf. *In re Gahan*, 279 N.W.2d 826 (Minn. 1979) (fact of bankruptcy may not be considered, but constitutional limitations do not preclude court from inquiring into bar applicant's responsibility or moral character in financial matters).

considering even bankruptcy itself as one factor in evaluating an employee's fitness.

The House report confirms that an employer may consider circumstances surrounding an employee's bankruptcy. The House report states (H.R. Rep. No. 95-595, 95th Cong., 1st Sess. (1977); Pet. App. A-40):

> The prohibition does not extend so far as to prohibit examination of the factors surrounding the bankruptcy, the imposition of financial responsibility rules if they are not imposed only on former bankrupts, or the examination of prospective financial condition or managerial ability. The purpose of the section is to prevent an automatic reaction against an individual for availing himself of the protection of the bankruptcy laws.

The House report adds that "in those cases where the causes of a bankruptcy are intimately connected with the license, grant, or employment in question, an examination into the circumstances surrounding the bankruptcy will permit governmental units to pursue appropriate regulatory policies and take appropriate action without running afoul of bankruptcy policy" (*id.* at A-41).

The statements in the legislative history make clear that Section 525 does not preclude an employer from investigating an employee's financial condition and even taking into account circumstances surrounding the employee's bankruptcy as a means of evaluating the employee's fitness for a particular position. The INS's actions in this case were consistent with the guidelines described in the legislative history. Although it was petitioner's bankruptcy filing that called his debts to the attention of the INS, petitioner's discharge was not an automatic reaction to his bankruptcy. Rather, INS officials questioned petitioner about his debts, the circumstances surrounding his bankruptcy, and his

efforts to repay or reschedule his financial obligations, giving petitioner an opportunity to explain his financial situation.[8]

The INS policy against excessive indebtedness is related to the agency's concern with job-related characteristics, such as future financial responsibility and degree of judgment. Both the Border Patrol Handbook and the INS Service Manual stress the importance of paying just debts in a timely manner (Pet. App. A-25, A-27). As the Court of Claims observed, this policy is particularly appropriate in the case of employees who are possible bribery targets (*id.* at A-6). The District of Columbia Circuit also has recognized the reasonableness of such a policy in discussing a refusal to employ an applicant as a police officer on the ground that he had previously filed for bankruptcy. See *Marshall* v. *District of Columbia Government, supra*, (559 F. 2d at 729-730 (emphasis in original)):[9]

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[8]Petitioner implies that there may have been mitigating circumstances surrounding his bankruptcy (Pet. 10). However, he does not suggest what these circumstances are. Nor is there any indication that he was not given an opportunity to explain any such circumstances to INS officials.

[9]Petitioner attempts (Pet. 9 n.18) to distinguish *Marshall* on several grounds, none of which is successful. First, the principle stated in *Marshall* is not affected by the fact that the plaintiff in *Marshall* had been an applicant for employment, while petitioner was a probationary employee. In both cases the interest of the government agency in avoiding fiscally irresponsible employees is the same. Second, although petitioner was not asked about his financial status in his employment application, INS guidelines clearly spelled out INS policy on this subject, and the INS took action as soon as it learned of petitioner's situation. Finally, it is irrelevant that the refusal to employ the plaintiff in *Marshall* was not in reaction to his *recently* having filed bankruptcy. In fact, the plaintiff in *Marshall* clearly was rejected on the ground that he had "previously" been adjudged bankrupt (559 F. 2d at 727), while the Court of Claims found that petitioner's dismissal was not the result of his bankruptcy filing.

> The *fact* that one has been unable to successfully manage his financial affairs in the past might well be considered a sufficient deficiency in his qualifications to justify a refusal to employ him as a police officer. Police officers, because of the nature of their work, are frequent targets of bribery attempts. The District of Columbia might well desire, to the maximum extent possible, to insulate its law enforcement from such corrupt endeavors by refusing to employ officers who, because they were unable to successfully manage their financial affairs in the past might be unable to do so while they were police officers and thus be more susceptible to bribery than other applicants who had demonstrated such capability.

Similar considerations obviously apply to the position of Border Patrol Agent, which involves investigation of illegal traffic in drugs and aliens (Pet. App. A-10).[10]

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[10]A number of courts have concluded that federal agencies have a legitimate interest in ensuring that their employees do not accumulate unreasonable debts. On two occasions the Ninth Circuit has upheld the discharge of postal employees pursuant to a Postal Service regulation requiring employees to pay their just debts in a timely and proper manner. See *Dennis* v. *Blount*, 497 F. 2d 1305 (1974); *Robinson* v. *Blount*, 472 F. 2d 839 (1973). See also *Jenkins* v. *Macy*, 357 F. 2d 62 (8th Cir. 1966), and *McEachern* v. *Macy*, 341 F. 2d 895 (4th Cir. 1965), in which the courts upheld the discharge of employees who had failed to pay debts following receipt of numerous complaints which tended to bring discredit on the employer. While the justifications cited in these cases are not directly applicable to petitioner's case, they confirm the reasonableness of the INS policy toward excessive and recurring indebtedness. See also *Non-Resident Taxpayers Association* v. *Municipality of Philadelphia*, 478 F. 2d 456, 460 (3d Cir. 1973); *Carter* v. *Forrestal*, 175 F. 2d 364 (D.C. Cir.), cert. denied, 338 U.S. 832 (1949).

Petitioner argues that his indebtedness had no effect on his employment because the INS received no complaints from petitioner's creditors during his year of probationary employment (Pet. 9-10). This misses the point of INS's concern about indebtedness, which was based on the reasonable belief that Border Patrol Agents who accumulate heavy debts are more likely to be susceptible to bribery attempts.

The INS letter of July 27, 1978, states that petitioner was being dismissed not because of his bankruptcy filing, but because of his excessive indebtedness, which reflected adversely on the INS and on the government and indicated a lack of judgment necessary for INS officers.[11] The Court of Claims specifically found that petitioner was dismissed for excessive indebtedness, not for his bankruptcy filing. Petitioner has not challenged the factual accuracy of INS's conclusion concerning his excessive indebtedness. It is clear that the dismissal was not based "solely" on petitioner's bankruptcy, but was based on his excessive indebtedness. The INS reasonably concluded that such indebtedness was likely to have an adverse effect on petitioner's job performance and was an indication of lack of the degree of judgment necessary for his position. Thus, petitioner's dismissal was proper not only under *Perez*, but also under the standards subsequently established by Congress in Section 525.[12]

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[11]In addition, petitioner was informed during an interview with INS officials in July 1978 that he would be terminated because of his "continuing chronic reoccurring indebtedness" (Pet. App. A-32). The Federal Employee Appeals Authority concluded that petitioner was terminated for "excessive indebtedness" (*id.* at A-13).

[12]*Rutledge* v. *City of Shreveport*, 387 F. Supp. 1277 (W.D. La. 1975), appeal dismissed, No. 75-1775 (5th Cir., Sept. 14, 1976), cited by petitioner (Pet. 7 n.15), involved a police officer who was discharged solely on the ground that he had filed for bankruptcy, pursuant to a regulation requiring automatic discharge in such circumstances. Here, by contrast, the Court of Claims found that petitioner was not discharged on the basis of his bankruptcy filing. The other cases cited by petitioner also concerned actions taken solely on the basis of bankruptcy. See *In re Loftin, supra* (automatic termination of fireman because of bankruptcy filing); *Grimes* v. *Hoschler*, 12 Cal. 3d 305, 525 P.2d 65, 115 Cal. Rptr. 625 (1974), cert. denied, 420 U.S. 973 (1975) (loss of license because certain debts had been discharged in bankruptcy). In *In re Hicks*, 133 F. 739 (N.D.N.Y. 1905), a fireman was terminated because of failure to pay a particular debt that was dischargeable in the bankruptcy action he had initiated. The court noted that there was no indication that the debt, which amounted to $37.10, impaired the discipline of the fire department in any way. *Id.* at 741.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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